Rule 26, Ariz. R. Crim. P.

SENTENCING – Presentence hearings; What court may consider at presentence hearings under rule 26.7, Ariz. R. Crim. P. ……...Revised 3/2010

Rule 26.7, Ariz. R. Crim. P., permits a party or the court itself to call for a presentencing hearing in any case in which the court has discretion over the penalty to be imposed. If any party requests a presentence hearing, the trial court must hold one. Rule 26.7 states:

> Pre-sentencing hearing; request, purpose, pre-hearing conference
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> a. Request for a Pre-Sentencing Hearing. When the court has discretion as to the penalty to be imposed, it may on its own initiative, and shall on the request of any party, hold a pre-sentencing hearing at any time prior to sentencing.
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> b. Nature, Time and Purpose of the Pre-sentencing Hearing. A pre-sentencing hearing shall not be held until the parties have had an opportunity to examine any reports prepared under Rules 26.4 and 26.5. At the hearing any party may introduce any reliable, relevant evidence, including hearsay, in order to show aggravating or mitigating circumstances, to show why sentence should not be imposed, or to correct or amplify the pre-sentence, diagnostic or mental health reports, the hearing shall be held in open court and a complete record of the proceedings made.
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> c. Pre-Hearing Conference. The court, on its own initiative or on motion of the parties, may hold a pre-hearing conference to ascertain and limit the matters in dispute or otherwise expedite the pre-sentencing hearing. The court may order the probation officer who prepared the presentence report to attend.
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> At such conference the court may postpone the date of sentencing for up to 10 days beyond the maximum extension permitted by Rule 26.3(b) and delay the pre-sentencing hearing accordingly, in order to allow the probation officer to investigate any matter specified by the court, or to refer the defendant for mental health examinations or diagnostic tests.

The purpose of a presentence hearing is to insure that the sentencing judge is fully informed as to the character of the individual to be sentenced and the

circumstances of the crime. *State v. Ohta*, 114 Ariz. 489, 492, 562 P.2d 369, 372 (1977); *A.H. by Weiss v. Superior Court,* 184 Ariz. 627, 630, 911 P.2d 633, 636 (App. 1996). The sentencing judge must look at both the offense and at the offender in determining the appropriate sentence to impose within the range set by the legislature. "The court should take into account both … the past conduct and moral character of the defendant so that the punishment may fit the offense and the offender." *State v. Shuler*, 162 Ariz. 19, 21, 780 P.2d 1067, 1069 (App. 1989) [internal quotation marks and citations omitted].

The Comment to Rule 26.7 states that a presentence hearing "may be held without regard to the manner in which guilt was determined" – that is, by a jury trial, a bench trial, or an admission.

In addition, Rule 26.7 permits the introduction of "reliable, relevant" evidence, including reliable hearsay, at the hearing. Hearsay is admissible at a sentencing hearing because a defendant does not have a constitutional right to confront and cross-examine his accusers at the sentencing stage. *A.H. v. Superior Court*, 184 Ariz. 627, 629, 911 P.2d 633, 635 (App. 1996). As the Comment to Rule 26.7 states, "Clearly the pre-sentence, diagnostic and mental health reports are forms of hearsay." The trial court should consider those reports and may consider other information as well:

> The trial judge has wide discretion to review a variety of sources and types of information in determining the extent of punishment. *State v. Ross*, 144 Ariz. 154, 157, 696 P.2d 706, 709 (App. 1984). We will not overturn the court's finding of relevancy absent an abuse of discretion. *State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990), *cert. denied*, 500 U.S. 929, 111 S.Ct. 2044, 114 L.Ed.2d 129 (1991). The purpose of a presentence hearing is to insure that the sentencing judge is fully informed as to the character of the individual to be sentenced **and the**

> **circumstances of the crime.** *State v. Ohta*, 114 Ariz. 489, 562 P.2d 369 (1977). This is especially true when the sentence to be imposed is completely within the discretion of the trial judge. *State v. Fenton*, 86 Ariz. 111, 341 P.2d 237, *cert. denied*, 361 U.S. 877, 80 S.Ct. 142, 4 L.Ed.2d 115 (1959).

A.H. by Weiss v. Superior Court, 184 Ariz. at 630, 911 P.2d at 636 [emphasis in original]. *See also State v. Asbury*, 145 Ariz. 381, 385-86, 701 P.2d 1189, 1193-94 (App. 1984).

The trial court may consider matters that would not be admissible at trial in making a sentencing decision. For example, the sentencing court may consider unsworn testimony and out-of-court statements in making the sentencing decision. *State v. Johnson*, 131 Ariz. 299, 306, 640 P.2d 861, 867 (1982). The court may consider police reports and victim statements*. Matter of Appeal in Maricopa County Juvenile Action No. JV-512016*, 186 Ariz. 414, 418, 923 P.2d 880, 884 (App. 1996). The court may consider any relevant evidence to rebut the defendant's claims of mitigation, even though that evidence was not admissible at trial. *State v. Kiles*, 175 Ariz. 358, 368, 857 P.2d 1212, 1222 (1993). The sentencing court may even consider information about a crime for which the defendant has been acquitted, so long as there is some evidence that the defendant committed the offense. *United States v. Watts*, 519 U.S. 148, 157 (1997) [holding that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence"]; *State v. Curry*, 187 Ariz. 623, 632, 931 P.2d 1133, 1142 (App. 1996); *State v. Johnson*, 183 Ariz. 623, 635, 905 P.2d 1002, 1014 (App. 1995). "It is not an abuse of the judge's sentencing

discretion to consider the original charges brought against a defendant when there is evidence that defendant committed crimes beyond the offense for which he faces sentence." *State v. Harvey*, 193 Ariz. 472, 476, 974 P.2d 451, 455 (App. 1998). However, the trial court may not aggravate a defendant's sentence based on the mere report of an arrest; there must be some evidence about the underlying facts to show that the defendant probably committed a crime of some sort. *State v. Shuler*, 162 Ariz. 19, 21, 780 P.2d 1067, 1069 (App. 1989).

The sentencing court is not bound by the probation officer's recommendations in the presentence report. *State v. Toulouse*, 122 Ariz. 275, 278, 594 P.2d 529, 532 (1979); *State v. Patton*, 120 Ariz. 386, 389-90, 586 P.2d 635, 638-39 (1978). *See also State v. Flemming*, 184 Ariz. 110, 113, 907 P.2d 496, 499 (1995); *Appeal in Juvenile Action J-96695*, 146 Ariz. 238, 246, 705 P.2d 478, 486 (App. 1985). Similarly, in determining the proper disposition for juvenile offenders, the juvenile court is not bound by the recommendations of mental health experts. *Appeal in Coconino County Juvenile Action No. J-10359,* 154 Ariz. 240, 243, 741 P.2d 1218, 221 (1987); *Appeal in Coconino County Juvenile Action No. J-10359*, 157 Ariz. 81, 90, 754 P.2d 1356, 1365 (App. 1987). Further, the trial court is not bound by the prosecution's recommendations. *State v. Brewer*, 170 Ariz. 486, 498, 826 P.2d 783, 795 (1992).